



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.20 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.1199 of 2015 by: Hon. V.A. Ochanda – R.M.)

FREDRICK WANJALA NABISWA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

Fredrick Wanjala Nabiswa was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 9th and 17th May, 2015 at [Particulars withheld] area in Laikipia County, intentionally and unlawfully caused his genital organ, namely penis to penetrate the genital organs (vagina) of **MNK** a girl aged 16 years.

In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. No finding was made on the alternative charge. Upon conviction he was sentenced to serve 15 years imprisonment.

Being aggrieved by the conviction and sentence, the appellant filed this appeal based on grounds filed in court on 27/2/2018 and supplementary grounds filed in court on 11/6/2019.

These are the summarized grounds:

- (1) That there was no medical evidence to prove the offence;***
- (2) That the complainant behaved like an adult and willingly engaged in the sexual act;***
- (3) That the offence was not proved to the required standard.***

In the first grounds filed in court on 27/2/2018, the appellant was only seeking the court's leniency. The grounds filed on 11/6/2019 are unclear and at the hearing of the appeal, the appellant insisted that he is dissatisfied with both the conviction and sentence.

He therefore prays that the conviction be quashed, sentence set aside or reduced he be set at liberty.

Mr. Maroro, learned counsel for the State opposed the appeal. He submitted that at the time the offence was committed, the complainant was aged 16 years and hence a minor, having been born on 13/3/1999; that when the complainant was examined by the doctor, it was found that her hymen was missing. She had a vaginal discharge; that the court arrived at the right decision that the appellant took part in a sexual act with the complainant after he took advantage of the complainant's vulnerability after she disagreed with her mother and fled from home to the appellant's house. Counsel further urged that the sentence is lawful and in accordance with Section 8(4) of the Sexual Offences Act and the court should not interfere with it.

This is the first appeal and it is required of this court to re-examine the evidence that was tendered before the trial court afresh, analyze it and the court to arrive at its own independent conclusions. This court however bears in mind that it did not have an opportunity to see or hear the witnesses testify, an opportunity which the trial court had. ***See Okeno v Republic (1972) EA 32.***

A summary of the evidence that was tendered before the trial court is as follows:

On 9/5/2015, the complainant **PW1 MNK**, who was then aged 16 years, having been born on 13/3/1999, went where her mother, **PW2 EN**

had gone to cut stones; they disagreed over Kshs.100/= which the complainant had misused. When sheltering from rain in a certain house, PW2 beat her and she left, went to the appellant's house where she stayed from 9/5/2015 till 17/5/2015 when she returned home. She said that she was friends with the appellant and they slept together on these days and had sex. By then, PW2 had been searching for PW1 and had reported at Muthangera Police Station. PW1 said that she knew the appellant before as they were friends.

PW2 testified that after PW1 left on 9/5/2015 about 5.30 p.m., she looked for her in vain and reported to the police; that PW1 returned on 17/5/2015 and they went to the police station, was interrogated and the police went with PW1 to the appellant's house where he was arrested.

PW3, Charles Ngujiri Assistant Chief of Muthengera received a call from Sgt. Githuku the in-charge of the Administration Police Camp who asked him to accompany him to Wanjala's house, which the complainant pointed out to them and they arrested him.

PW4 Dr. Joseph Karimi of Nyahururu County Hospital examined PW1 on 21/5/2015. He observed that the hymen was missing and there was a whitish foul smelling vaginal discharge. He was not able to tell whether the hymen was freshly torn or not.

PW5 PC Kioko Musembi of Ngarua Police Station recorded a report of the complainant having been detained and defiled for 8 days by the appellant who was taken to Wanjiku Police Post where PW5 was working.

After the close of the prosecution case, the court found that a prima facie case had been made against the appellant and he was placed on his defence. He opted to remain silent which is his right.

The fact that the appellant remained silent did not however in any way lighten the burden placed on the prosecution to prove its case beyond reasonable doubt.

To prove an offence of defilement, the prosecution has to prove beyond reasonable doubt the following ingredients:

(1) That there was penetration;

(2) The age of the complainant;

(3) The identity of the offender.

The complainant was born on 13/3/1999 which evidence was corroborated by PW2, her mother and a birth certificate that was produced as an exhibit. As of 9/5/2015, she was 16 years old and hence a minor.

The complainant is the only witness to the offence. She testified on oath that after she disagreed with her mother on 9/5/2015, she went to appellant's house. She told the court how she knew him before, he was her friend. It is no wonder she went directly to his house after she disagreed with the mother. PW1 stayed with the appellant for 9 days – 9/5/2015 to 17/5/2015 when she returned home. She vividly narrated that she had sex with the appellant on all the days she was there. Her evidence was not shaken in any way and there is no reason disclosed why she should lie.

PW1 was examined by PW4 who found that the hymen was missing and she had a whitish discharge. He could not determine whether the hymen was freshly torn or not. In any event the hymen can be torn in any other man other than through a sexual act. The P3 form was filed on 25/5/2015 and by then the evidence may have disappeared.

The trial court believed PW1's testimony, that she was involved in sexual intercourse with the appellant for all the days she was away from home. Later, she led police to his home where he was arrested. There is no reason for this court to arrive at a different finding.

The appellant was known to the complainant and there is no evidence to the contrary. The complainant did not just meet the appellant but they stayed together for 9 days and the complainant later led police to his house. I am satisfied that the appellant was the perpetrator.

In his submissions, the appellant was alleging that the complainant behaved like an adult having gone to his house herself got what she was looking for. Even if the complainant took herself to appellant's house, that did not give the appellant the right to take advantage of the complainant. She was a minor. He could have returned her to her home or reported to the nearest authority e.g. the Chief. But he took total advantage and stayed with her for 9 days.

In the end, I find that the offence was proved to the required standard of beyond reasonable doubt and the trial court arrived at the proper finding.

As regards the sentence, the appellant was sentenced pursuant to Section 8(4) of the Sexual Offences Act which provides for a minimum sentence of 15 years upon conviction for an offence of defilement where the victim is aged between 15 to 18 years.

However, I have taken into account the recent Court of Appeal decision in **HCRA.93/2014 Jared Koita Injiri v Republic**, where Musinga, M'Inoti and Murgor JJA adopted the Supreme Court decision in **Francis Karioko Muruatetu and another v Republic SC.Pet.16/2015** where the Supreme Court held that Section 204 of the Penal Code which provided for a mandatory death sentence for the offence of murder, deprived the court of the exercise of its discretion and was unconstitutional.

The Court of Appeal applied the same reasoning to Section 8(2) of the Sexual Offences Act which provides for a minimum sentence where the victim of defilement was 9 years old. The Court of Appeal set aside the life imprisonment sentence and instead the sentenced the

appellant in that case to 30 years imprisonment.

This court is guided by that decision. Having considered the grounds of appeal and the circumstances under which the offence was committed, I hereby allow the appeal on sentence and set aside the sentence of 15 years imprisonment. Instead, I substitute it with 7 years thereof.

The sentence will run from the date the appellant was sentenced on 27/12/2016.

Dated, Signed and Delivered at NYAHURURU this 28th day of June, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – Prosecution Counsel

Soi – Court Assistant

Appellant – in person